No. 89-1987

In the Supreme Court of the United States

OCTOBER TERM, 1990

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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1. Respondent mistakenly states (Br. in Opp. 3) that the only question on which the government has sought review here "is whether losses were 'realized' " in the mortgage exchanges and then argues that there is no conflict in the circuits on that legal question. The petition in fact presents the broader question whether the financial institutions "realize[d] a *deductible* loss for income tax purposes" upon the mortgage exchanges (Pet. I (emphasis added)). That is, the question presented here is simply the ultimate question whether the Commissioner correctly disallowed the losses claimed by financial institutions as a result of these transactions—a question on which there is a clear conflict in the circuits. As we explain in our reply in *United States* v. *Centennial Savings Bank FSB (Resolution Trust Corporation, Receiver)*, No. 89-1926 (a copy of which is being furnished to

respondent), that question of deductibility encompasses both issues relating to realization under Section 1001 and the question whether Section 165 permits the deduction, and the lower courts are in considerable disarray with respect to all of those issues. Accordingly, the Court should grant certiorari on the question presented in the petition, and consider all the relevant issues, in order to achieve a definitive resolution of the allowability of the loss deductions claimed as a result of the mortgage exchanges—"an issue of real magnitude for the entire thrift industry" (U.S. League of Savings Institutions (Amicus Br. 4) and the IRS.

2. Respondent urges this Court, if it determines to grant certiorari on the mortgage exchange issue, to resolve it in the context of this case (see Pet. 9-10, 17-18). Contrary to respondent's assertion (see Pet. 9), the Commissioner does not object to plenary review in this case. Because this case arises in an atypical factual context, however, the Commissioner does believe that it would be inadvisable to grant plenary review in this case *as the lead case*, while holding the other pending petitions for disposition in accordance with the decision on the merits. This concern is shared by the other parties interested in this Court's resolution of the mortgage exchange issue. See Centennal Br. in Opp. 10 n.6; First Federal Br. in Opp. 8 n.3; U.S. League of Savings Institutions Amicus Br. 16 n.10.

In contrast to the taxpayers in the other mortgage exchange cases pending before this Court and elsewhere in the judicial and administrative system, respondent is not a financial institution that was subject to regulation by the FHLBB, and thus it was not directly affected by Memorandum R-49. Rather, it is an agency created by the government to facili-

tate liquidity in the private secondary mortgage market; respondent is now privately owned, but subject to regulation by the Department of Housing and Urban Development. As a result of respondent's singular status, the trial in this case resulted in certain factual findings unique to this case. In particular, the Tax Court here found that respondent had several nontax business purposes for engaging in the mortgage exchanges—notably the desire to exchange nonurban loans for urban loans in response to congressional criticism that respondent had insufficient holdings of urban mortgages. See Pet. App. 29a, 32a-35a. These findings diverge from the typical case involving a savings institution, where any differences among the exchanged mortgages plainly were not material to the taxpayer, who entered into the exchanges simply in order to generate a tax loss while preserving its financial accounting position with the FHLBB according to Memorandum R-49. See, *e.g.*, *Cottage Savings Ass'n* v. *Commissioner*, 890 F.2d 848, 849 (1989), petition for cert. pending, No. 89-1965; *Centennial Savings Bank FSB* v. *United States*, 682 F. Supp. 1389, 1399 (N.D. Tex. 1988), rev'd, 887 F.2d 595 (5th Cir. 1989), petition for cert. pending, No. 89-1926.

Respondent has argued, and apparently continues to argue (see Br. in Opp. 6 n.6), that the unique factual findings in its case serve to distinguish its case from those of other financial institutions and could support a decision in respondent's favor even if the general rule were that Memorandum R-49 mortgage exchanges lacking any nontax business purposes do not give rise to a deductible loss. See also Br. in Opp. 5 (stating that "the Commissioner has waived any section 165 argument" in this case). While the Commissioner does not agree that the

unique factual findings in this case warrant a different result from the typical mortgage exchange case involving a savings institution,[1] respondent's reliance on these findings raises the possibility that this case could be decided in a manner that would fail to establish a general rule to govern the pending cases in which the taxpayer is a savings institution. Accordingly, in the event the Court determines that plenary review should be granted in this case in light of the large sum of money at stake, we urge the Court also to grant plenary review in another of the pending petitions in which the taxpayer is a savings institution.

3. In support of its suggestion that its own case be treated as the lead case on the mortage exchange issue, respondent contends (Br. in Opp. 10-16) that the pending cases in which the taxpayer is in Resolution Trust Corporation (RTC) receivership are not justiciable. Respondent asserts that, if the receiver prevails in those cases, the disputed funds ultimately will be transferred to the RTC in its corporate capacity to cover its advances to pay the claims of insured depositors. Accordingly, respondent argues (*id.* at 10) that "the RTC is the real party in interest and * * * the funds in question will remain in the possession of the United States regardless of the outcome of the litigation. Thus, there is no case or controversy for purposes of Article III." This contention is incorrect because it overlooks the fact that the RTC is serving as receiver of a private taxpayer

[1] Respondent's arguments concerning the significance of these factual findings could appropriately be considered in the first instance by the court of appeals if this Court's decision in another case warranted a remand of this case for reconsideration.

and acts, not in its own interest, but in the place of that private corporation.[2]

Although respondent seeks to distinguish prior cases of this Court in which the opposing parties have both been arms of the federal government, respondent does not explain why the cases involving RTC as receiver are not justiciable. This Court has made clear that disputes may be justiciable even if both litigants are components of the Executive Branch. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 692-697 (1974). Here, there can be no doubt that the cases

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[2] Respondent's assumption that all of the money recovered by the RTC acting as receiver ultimately will find its way into the coffers of the RTC in its corporate capacity is not necessarily correct. An institution is insolvent when its current assets are not sufficient to cover its current liabilities—including the claims of insured depositors, uninsured depositors, and other creditors. The receiver seeks to gather and liquidate the institution's assets in order to pay the claims of creditors to the maximum extent possible. If the total amount of gathered assets does not exceed the claims of insured depositors, then the ultimate effect of a particular collection (such as prevailing in a tax refund suit) will be simply to reimburse the RTC for the funds expended in meeting its insurance liabilities. On the other hand, if the total collection exceeds the claims of insured depositors, some of the collected assets will go to parties other than the RTC. While the severity of the crisis in the savings and loan industry makes it likely that many of the receiverships will not be able to collect assets in excess of the claims of insured depositors, we are not certain of the financial particulars of the cases currently pending before this Court, and those particulars are in any event subject to change in light of ongoing collection efforts. At any rate, as we explain *infra*, even if all the funds at issue in these cases ultimately would be paid to reimburse the RTC in its corporate capacity, the controversy between the United States and the RTC in its capacity as receiver of an insolvent institution nonetheless is justiciable.

in which the RTC is acting as receiver involve a "controversy" in the constitutional sense. This tax dispute is "the kind of controversy courts traditionally resolve" (*id.* at 696); indeed, respondent is urging this Court to resolve essentially the same controversy in its own case. And it is also true that these cases come to this Court in a setting that assures the "concrete adverseness which sharpens the presentation of issues" (*id.* at 697 (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962))); the receiver is merely continuing for the benefit of a private taxpayer and its creditors a lawsuit designed to augment the assets, not of the United States, but of that taxpayer.[3]

Respondent's efforts to analogize these cases to other kinds of allegedly nonjusticiable lawsuits are misconceived. In contrast to the IRS-Postal Service dispute cited by respondent (see Br. in Opp. 11), these are not cases in which the government is suing itself; rather, the suits were commenced by private parties and continued by the RTC on behalf of those private parties. And, unlike tax revenues, funds held

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[3] Respondent does not appear to dispute that these cases would be justiciable if it were clear that all funds recovered by the RTC would be passed along to the taxpayer's private creditors. That is, respondent acknowledges that the RTC's status as receiver creates sufficient adverseness between the RTC and the United States to make the case justiciable, even though the RTC in its corporate capacity may be indifferent to the outcome of the case. The fact that the RTC in its corporate capacity is a priority creditor of the taxpayer and therefore stands to benefit if the receiver wins the lawsuit—through an increase in the RTC's corporate funding outside the congressional appropriation process—can only heighten, not diminish, the adverse relationship between the parties. Thus, the adverseness component of the Article III "cases [or] controversies" requirement is plainly satisfied here.

by the RTC are not a part of the general funds of the Treasury of the United States available to defray any of the disparate expenses of the government. Nor are these cases mere intra-branch disputes that are not justiciable because they are appropriately resolved by an Executive Branch official without judicial involvement. Cf. Br. in Opp. 12; *United States* v. *Nixon*, 418 U.S. at 693. Congress established the RTC's role as receiver to act in the interest of the insolvent institution and its creditors, not in the general interest of the government. Accordingly, a dispute between the government and the RTC acting as receiver cannot appropriately be resolved simply by the decree of an Executive Branch official; Congress has specifically directed that "in the exercise of [its powers as receiver, the RTC] shall not be subject to the direction or supervision of the Secretary of the Treasury or the Comptroller of the Currency." See 12 U.S.C. 1821(d) (cross-referenced in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 501(a), 103 Stat. 370).[4] There is no Article III impediment to this Court's consideration of the mortgage exchange issue in a case in which the RTC is now the receiver of the savings institution.[5]

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[4] The President's power to remove the Board of Directors of the RTC (see Br. in Opp. 15) does not affect the justiciability of this controversy any more than did the power of the Attorney General to revoke the regulation defining the Special Prosecutor's authority in *United States* v. *Nixon, supra*. See 418 U.S. at 696.

[5] If, contrary to our submission, the Court were to conclude that the cases involving the RTC are not justiciable, it would be appropriate for this Court to vacate the judgments in those cases and remand with instructions to dismiss. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). In-

For the foregoing reasons, and those stated in our petition, the petition for a writ of certiorari should be disposed of as appropriate in light of this Court's disposition of *United States* v. *Centennial Savings Bank (Resolution Trust Company, Receiver)*, No. 89-1926.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

SEPTEMBER 1990

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deed, under this view, the decisions in *Centennial* and *San Antonio* should never have been entered by the court of appeals because the institutions in those cases were already in RTC receivership before the cases were decided.

* The Solicitor General is disqualified in this case.

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